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CASE

Upon the PETITION

OF

His Grace the Duke of *Ancaſter* and Lord *Robert Bertie*, to His Majeſty, concerning the Dignity, or Office of Lord Great Chamberlain of *England*, and referred by His Majeſty to the Houſe of Lords, upon the Report of His Majeſty's Attorney General.

THERE is no Diſpute, nor any Doubt concerning the Pedigree of the Petitioners; it is clear that the preſent Duke is in lawful Poſſeſſion of that Title, as the Male Heir of the Family, upon the Death, of the late Duke his Nephew, who died without Iſſue, leaving two Siſters at the Time of his Death and ſtill under Age, *viz.* Lady *Priſcilla Barbara Elizabeth*, (now Lady *Willoughby*, of *Ereſby*,) the Eldeſt Siſter, married to *Peter Burrell*, Eſquire, and Lady *Georgina Charlotte Bertie*, the youngeſt Siſter.

The Anceſtors of the Petitioners, have for many Generations during the Courſe of a Century and a Half laſt paſt, uninterruptedly enjoyed the Dignity or Office of Lord Great Chamberlain, a Dignity ſo high, that *Robert* Marquis of *Lindſey*, when he was created a Duke of *Great Britain*, by the Stile and Title of Duke of *Ancaſter* and *Keſteven*, would, as Lord Great Chamberlain, by Virtue of the Statute made in the Thirty-firſt Year of the Reign of King *Henry* the Eighth, have had Precedency of all Dukes before that Time created, if another Act of Parliament had not been made in the Firſt Year of the Reign of King *George* the Firſt to prevent it, except when in actual Execution of the Office of Great Chamberlain attending the Perſon of His Majeſty, or introducing a Peer or Peers into the Houſe of Lords.

From the Conſideration of ſuch a Dignity, and in this Situation of the Family, it was natural to conceive that the preſent Duke was the fitteſt Perſon to be inveſted with it, there being no Heir of the Family before him capable of holding or exerciſing the Office.

The Petitioners are afraid, that upon more mature Deliberation, they cannot contend that the Act of Parliament, ſettling the Precedency of the Dukes of *Ancaſter* and *Keſteven*, either gives or takes away any Title to the Office of Lord Great Chamberlain, which exiſted antecedent to that Act.

But they do conceive and beg leave to contend, that the Lord Great Chamberlain ought to be a Lord of Parliament, and that no Perſon of inferior Degree ever had a Grant of the Office, or ever exerciſed it in all its Duties or Services, though for the temporary Purpoſe of a Coronation, or for other temporary Purpoſes during the Incapacity of the Heir (by Attainder or otherwiſe) ſome Parts of the Office may, at the Pleaſure of the King, have been exerciſed by a Commoner.

They humbly conceive and contend, that a Female Heir is equally incapable of holding, as ſhe is of exerciſing the Office, and that ſhe cannot by her Deputy or by any Huſband upon whom ſhe may beſtow herſelf in Marriage, legally Claim a Right to hold or to exerciſe this Office, but merely by the Pleaſure of the King and by his ſpecial Licence; and that in the preſent Caſe, the Right to appoint the Lord Great Chamberlain is veſted in the King, until there be an Heir capable of holding and exerciſing the Office, and that the Petitioner, the Duke of *Ancaſter*, appears to be the fitteſt Perſon in his Family, by the gracious Favor of His Majeſty to hold and exerciſe ſuch Office under all the Circumſtances of this Caſe.

In theſe Reſpects they have the Misfortune to differ from the learned Opinion of the Attorney General, as expreſſed in his Report.

And they contend that it ought to be ſhewn by any Commoner, who Claims to hold or exerciſe this High Dignity or Office, that the Grant of it was ever made to a Commoner, for Years, for Life, in Tail or in Fee.

It is believed that the Annals of *England* do not furniſh ſuch a Grant, and yet it is preſumed that all the Grants which ever exiſted of this Dignity or Office, are to be found in ſome of the uſual Repoſitories of ſuch Matters.

If the ſuppoſed Grant to Sir *Thomas de Erpingham*, for Life, ever exiſted, it would be found as well as all the other Original, and Inſpeximus, or Confirmatory Grants of this High Dignity. But it is admitted by the Attorney General, that it does not appear that he held the Office by a Grant for Life.

He admits alſo, that it was at a Period when the Earl of *Oxford* was under an actual or ſuppoſed Diſability. Let the Caſe be put, that the Earl of *Oxford* had recovered from, or removed ſuch Diſability, or had died, leaving a capable Heir, can it be imagined that the Earl, when reſtored to his Ability, or after his Deceaſe, all the ſucceeding Heirs of full Ability were to wait for the Office until the Death of Sir *Thomas de Erpingham*?

If by Grant of the Crown is meant a temporary Appointment, it is admitted, that under ſuch an Appointment Sir *Thomas de Erpingham* did execute the Office of Great Chamberlain at the Coronation of King *Henry* the IVth, and ſo the Lord Chief Juſtice *Crew*, in the Year 1626, ſtates the Fact to be, that he for that Time only was appointed by the King to do it: But that Sir *Thomas de Erpingham*, ever in Fact held or exercited the whole of the Office, or had any Grant or Appointment for ſo doing, is denied, and if this Inſtance is inſiſted upon, ſuch Fact ought to be proved, and ſatisfactorily made out. Two of the High Duties of the Office are ſpecified in the Act of Parliament, and in the Execution of which the Precedency is ſtill left, *(viz.)* to attend the King in Perſon, and to introduce Peers into the Houſe of Lords, neither of which Duties appear or are pretended to have been performed by Sir *Thomas de Erpingham*.

Report of Sir William Jones, 1 vol. p. 113.

In the Argument of Mr. Juſtice *Dodridge*, in the Year 1626, (as reported at large by Sir *William Jones*,) that learned Judge, who differed in the Point of Law from the Chief Juſtice, and the Chief Baron, as to the legal Claim between the then Heir Male, and the then Heir General, ſays, that this Office of Great Chamberlain hath been diverſely granted, not only in tempeſtuous Times, but in halcion Days, and in Times of Peace and Tranquillity. And that after the Award made by King *Henry* the Eighth, which he cauſed to be confirmed by Act of Parliament, and after the Death of *John* Earl of *Oxford*, party to the Award, and *John* his Son, Father of *Edward*, either for that he was not ſo fit to exerciſe this Great Office, or upon ſome other Occaſion, King *Henry* the Eighth gave the ſaid Office in the Thirty-ſecond Year of his Reign, to *Robert* Earl of *Suſſex*, with

1 vol. of the Reports of Sir William Jones p. 126.

with all Fees, &c. which formerly the ſame King had granted unto *Thomas Cromwell*, Earl of *Eſſex*. Pat. 32 *H.* 8. Part 6.

And that King *Edward* the Sixth granted the ſame Office afterwards to *John*, Earl of *Somerſet*, Viſcount *Liſle*, which Office formerly, as by the Recital appeareth, was granted by the ſame King to *Edward* Earl of *Hereford*, and was by him formerly ſurrendered to the ſaid King, Pat. 1. *E.* 6. Part 6.

And that the ſame King *Edward* the Sixth, in the Fourth Year of his Reign, granted the ſaid Office unto *William*, Marquis of *Northampton*, Earl of *Eſſex*, and Lord *Parr*, which he had formerly granted unto *John*, Earl of *Warwick*, as by the Recital appeareth, who had ſurrendered the ſame before unto the ſaid King. Pat. 4. *E.* 6. Part 1.

And the ſame learned Judge concludes theſe Inſtances of the repeated Grants of the Crown of this Great Office, with this Remark, that when this Honorable Office came into the Hand of One not ſo fitting, it came to the Diſpoſition of the Kings of this Realm, as the original Founders thereof; and upon this Point, the learned Judges agreed, for the Lord Chief Juſtice ſays, it is to be preſumed, that no Stranger of Blood would enterprize to contract for this Office, without the Privity and Conſent of the King, nor any other but a great and eminent Peer of the Realm, would be ſo ambitious as to deſire it, *or ſhould be tolerated* by the King to exerciſe the ſame, and that he cannot find that the Eſtate of this Office was ever granted to any under the Degree of a Duke or an Earl, only in 1 *Hen.* IVth, the then Earl of *Oxford* being in Diſgrace with the King, was not ſuffered to perform his Office at the Coronation; but Sir *William Eppringham*, (meaning Sir *Thomas de Erpingham,)* for that Time only, was appointed by the King to do it.

Same Book, p. 113.

If then none can or ought to hold the Eſtate of this high Dignity and Office of Lord Great Chamberlain, but a Lord of Parliament, as all the Grants ſhew, as all the Inſtances demonſtrate, as all Uſage confirms, as the Sages of the Law on ſolemn Argument have agreed, there is an End of Mr. *Burrell*'s Claim to hold and exerciſe the Office in Right of his Lady, and the Right of the Crown to appoint, until there is a capable Heir, appears to be without Controverſy.

As to the other Inſtance, in which the Petitioners are ſo unfortunate as to differ from the learned Opinion of the Attorney General, as expreſſed in his Report, *viz.* the Right of an eldeſt Female Heir to hold this high Dignity and Office, and to exerciſe it by her Huſband; it may be proper firſt to obſerve, that the Caſe in 1626 does not decide any ſuch Point, it goes no further than to decide the Preference of the Title of the Heir General, capable of holding and exerciſing the Office, to that of the Heir Male oppoſed to it.

The preſent Point therefore muſt depend upon the Conſideration of the Nature of this high Dignity and Office.

It is a Dignity and Office of the higheſt perſonal Truſt and Confidence; it is held of the Royal Perſon only.

Its principal Duty is, an Attendance upon the ſacred Perſon of the King, to bring his inmoſt Garment, to apparel him in his Royal Robes and Ornaments.

It is a meer perſonal Dignity, fixed in the Blood, and deſcendible to Poſterity, as long as the Heirs are capable of holding it.

It is annexed to nothing local or real, and though it has a deſcendible Quality, *viz.* to deſcend to a capable Heir, yet it has not all the Qualities or Properties of a Fee-Simple.

For it cannot be intailed by the Owner, becauſe that might change the Grant.

It is unalienable by the Owner, for the Grantee cannot transfer the Truſt to another, without the Aſſent of the Grantor.

Same Book, p. 122.

Mr. Juſtice *Dodridge* ſays, if the Truſt may deſcend, it is not material whether the Eſtate be Fee-Simple or otherwiſe, for the Eſtate in Fee-Simple is as well ſubject to Truſt as any other Eſtate—" And here, ſays he, two Objections are to be removed—Firſt, it may be ſaid, that when the Grant is in Fee-Simple of an Office, that the Grantee may grant that over to any other, and the Intent of the Grantor may be ſo conceived by Reaſon of the Generality of the Perſons comprehended in the Generality of the Eſtate in Fee Simple, for that may deſcend as well to Females as to Males, Idiots, Lunatics, Infants, or other Perſons unfit as well in Mind as in Body, and by the ſame Reaſon, it may be granted unto Strangers:" But, ſays the learned Judge, " I anſwer and deny the Conſequence; for we ſee, rather than it ſhould deſcend unto ſuch unable Perſons, the Grantor, and his Heirs, have ſuch a Power over the Grant, by Reaſon of the Confidence, that he and his Heirs, and none other, ſhall make a Subſtitute or an Aſſignee."

In the preſent Inſtance, two of the ſpecified Diſabilities occur, thoſe of a Female and Infant Heir.

The Attorney General, in his Report, inclines to think that there is is no Difference, in this Reſpect, between Offices annexed to Lands, Manors, or Honors, and a perſonal Dignity or Office, like the preſent, which is in Groſs.

And he admits that the Offices of Conſtable, Steward and Champion are annexed to ſome Honor, Manor, or Lands, as they undoubtedly are.

But it is apprehended that the legal Difference is clear and manifeſt.

Same Book, p. 127.

All Lands and Inheritances local, may be conveyed by way of Uſe.—But Inheritances perſonal, which have no Relation to Lands or local Hereditaments, cannot be conveyed by Way of Uſe—For, if ſo, this great Officer might be made and unmade at the Pleaſure of the Grantee, and there would be two diſtinct Confidences, the King's Confidence and that *of the Ceſtuyque* Uſe.

Offices annexed to local Inheritances, are rather in the Light of Services reſerved inſtead of Rent.

The Inheritances would be forfeitable by Non-performance of the Services.

If the Owners of ſuch Inheritances were incapable of performing the Services, they muſt of Neceſſity find and tender their Deputy, to prevent a Forfeiture.

The King would allow ſuch Deputy, if a proper one, if not, he would appoint one, but it is conceived that he could not ſeize the Inheritance, though he diſapproved of the Deputy—there being no Refuſal of the Service, but an Offer and Tender of it.

This is apprehended to be the Caſe where ſuch local Inheritances deſcend to a Female Heir, or to Coparceners. And it muſt be reaſonably ſuppoſed, that the Huſband of ſuch Female, or of the eldeſt Coparcener, would be the propereſt Perſon to perform the Services, as being more intereſted than a mere Deputy, to attend to the due Performance of them, and if the other Coparceners had Huſbands, as one could only execute the Office, it is fit that one ſhould be the eldeſt.

But it is conceived, that the Profits of the Lands, Manor, or Honor, to which ſuch Offices were annexed, would belong to the Coparceners.

This Doctrine appears in the Caſe of the Duke of *Buckingham*, quoted by Mr Attorney General, and mentioned in *Dyer's Reports* 285, b. *Plo*. 39. but more fully in *Keilway's Reports*, 170, 171.

Humphrey

Humphrey de Bohun, late Earl of *Hereford*, held the Manors of *Harlefield*, *Newnam* and *Whytenburſt*, in the County of *Glouceſter*, of the King, *By the Service of being Conſtable of England*, and had Iſſue two Daughters, and died ſeized; they entered into the Manors, and took Huſbands:—The Huſband of the youngeſt was afterwards King of *England*, and Partition was made, and the King and his Queen took the Manor of *Whytenburſt* for their Part, and the other Two Manors were allotted to the other Huſband and his Wife: Three Queſtions were made—

Firſt,—If the Reſervation of this Tenure was good, that is, whether this Office was or could be reſerved upon the Feoffment or not, and the Judges held that the Office might be reſerved, and that the Reſervation of the Tenure was good.

Secondly,—When the Manors where deſcended to the Wives, how they could execute the Office? And the Judges ſeemed clear, that they might make their ſufficient Deputy to exerciſe the Office for them——So this Queſtion and Anſwer are ſtated in *Keilway's Reports*.———*In Dyer's Reports thus.*

How the Daughters before Marriage could execute the Office?

It was clearly reſolved that they might make their ſufficient Deputy to execute it for them, and after the Marriage the Huſband of the eldeſt might execute it ſolely.

But it is clear, that the Profits of the Manors belonged to them equally, and making but one Heir, the Huſband of the eldeſt would properly be deemed to have the Preference of executing the Office ſolely; and as both of the Huſbands could not be the Officer, but one of them only, it was more fit that it ſhould be exerciſed by the Huſband of the eldeſt—This is conformable to the general Law of Coparceners in Matters not diviſible, and where there is nothing for Contribution or Allowance to the younger, *viz.* the eldeſt to have the firſt Preſentation to a Living, the firſt Draught of Fiſh in a Fiſhery, and in the Enjoyment of a Common, the eldeſt to have it firſt, for one Portion of Time, and then the youngeſt for the ſame Time afterwards.

But the Third Queſtion in the Duke of *Buckingham's* Caſe, ſhews it to be in no Way in Point to the preſent Caſe.

The Third Queſtion was more difficult, ſays the Report of *Dyer*; the Report of *Keilway* calls it the more diffuſe Queſtion, and it came to be ſo diffuſe that the Sight of the Queſtion is at laſt loſt.

Viz. Whether by the Unity of Parcel of the Tenancy in the King, the Office was determined, or it ſhould have its Exiſtence and Continuance in the other Coparcener. It was reſolved clearly, ſays the Report of *Dyer*, that it ſhould have continuance in the other, for otherwiſe they would have the two Manors, without doing any Service for them: and they are compellable at the Pleaſure of the King to exerciſe the Office; and the King may refuſe it at his Election and Pleaſure; as well as a common Lord of a Seignory may refuſe the Receipt of Homage of his Tenant, if it be not Homage *Anceſtrell*.

By this it clearly appears to have been an Office annexed to the Manors, or more properly, a Service reſerved for them, inſtead of Rent.

By the Report of *Keilway*, it appears that the Claim of the Duke of *Buckingham* to the Office of Conſtable, by Deſcent from the Eldeſt of the two Daughters of *Humphrey de Bohun*, was not merely in the Right of Eldeſt only, as ſeems to be ſuppoſed by Mr. Attorney General, but in Truth he was the Sole Heir, as appears by *Keilway's* Report; for upon the Truth of the Matter, *Erneley*, the King's Attorney, ſaid ſecretly, that the Lord the King who then was (*Henry* viiith) was not Heir to *Humphrey de Bohun* in Blood, for all the Blood of *Mary*, Mother to King *Henry* the Fifth, was ſpent and gone, whereby the Duke was *ſole Heir* to *Humphrey de Bohun*, which was a dangerous Thing to the Lord the King, for he had not any Right on the Part of the ſaid *Mary* unleſs by an Act of Parliament, wherefore it was good Policy for the King to leave the Duke to make his Title to the ſaid Office, as to a Thing in Groſs. And it was very true, that the Duke might preſcribe for the Office, for that he and all his Anceſtors, Time out of Mind, had been uſed to exerciſe the ſaid Office.

This Hiſtory of the Caſe muſt deſtroy its Authority if it had been in Point, which the Petitioners conceive it not to be.

But this Caſe is a ſtrong one, to prove the Difference between this high perſonal Dignity, or Office in Groſs, as it is termed, of the Lord Great Chamberlain, and any Office annexed or tied to Honors, Manors, or Lands; for the Lord Chief Juſtice *Crew*, ſpeaking of this Office, ſays, if *Humphrey de Bohun* had ſold the Land, by which the Office was holden, to a Stranger, the Purchaſor ſhould have been *Conſtable de Jure* without all Queſtion.

The Performance of the Office of Steward of *England*, is a Service reſerved upon the Grant of the Honour of *Hinckley*, and that Honor is held by the Service of being Steward of *England*, as the three Manors abovementioned were held by *Humphrey de Bohun* and his Heirs, by the Service of being Conſtable of *England*, and is ſubject to the ſame Obſervations.

The Office of Champion of *England*, in the *Dymock* Family, is a Service reſerved upon the Grant of Lands, and is ſubject to the ſame Obſervations as the Offices of Conſtable and Steward.

The laſt Caſe quoted by Mr. Attorney General, of the Marſhal of *England*, is ſuppoſed to be directly in Point, as being an Office in Groſs, and not annexed or tied to any Lands or local Inheritance.

But this ſeems to be a Miſtake, for it appears by a Record, ſtill preſerved in the *Exchequer*, of the Preſentment of Jurors at Aſſizes held at *Windſor* in *Berkſhire* before the King's Juſtices *Itinerant*, in the Twelfth Year of King *Edward* the Firſt, as to the Tenure of certain Lands within the Hundred of *Kentbury* in *Berkſhire*, that the ſame *Roger Bigot*, Earl of *Norfolk* and Marſhal of *England*, held *XX Libratas Terræ* by the Service or Serjeanty of Marſhal in *Hamſtede*. *Librata Terræ* is ſaid by ſome to contain four Oxgangs of Land, which would make in the whole fourſcore Oxgangs of Land, or as ſome ſay, *Librata Terræ* means Land of the yearly Value of Twenty Shillings of lawful Money, which would be Twenty Pounds of the Money of thoſe Days.

Note, That the Earl Marſhal was created about a Century afterwards by *Richard* the Second, who created *Thomas Mowbray*, Earl of *Nottingham*, the firſt Earl Marſhal.

It does not appear therefore, that there is any Precedent in Point to the preſent Caſe. But it ſhould ſeem that this Dignity or Office of Lord Great Chamberlain, being held of the King's Perſon, as King only, and not annexed to any Honor, Manor, Land or Local Inheritance whatever, is as much a perſonal Dignity as the Earldom of *Oxford*, which it ſo long accompanied, though wholly independant of it.

It has the ſame Quality *(videlicet)* that of an Honorable Dignity.

And why ought it not to have the ſame Rule of Deſcent, as an Earldom or other Perſonal Dignity? Mr. Juſtice *Dodridge* ſays, "If it be a Perſonal Dignity, as is the Earldom, if the Earldom cannot be aliened, I know no Reaſon that this ſhould be aliened." Sir *William Jones*, 1 Vol. 124, and he obſerves, "That it may be ſaid that this Honorable Office is an Office of Profit, for it hath ſundry Fees belonging to it, and therefore in

in Reſpect of that it may be aliened; *Diſtinguendum eſt*, where the Profit is the Principal, there Perchance ſome Alienation of the Profits may be, eſpecially in the Special Offices, where the Fee is the principal Thing regarded: But here this Honorable Service is the greater, and the Fee is but concomitant, and an Incident to the Office, and the Fee dieth with the Officer."

If ſo, as it is fallen upon Two Female Heirs, the King may ſuſpend the Right as he pleaſes, by granting it at his Pleaſure until it come again to a capable Heir.

If His Majeſty ſhould grant it to the Petitioners until Lady *Willoughby*, of *Ereſby*, or Lady *Georgina Charlotte Bertie*, ſhould have Iſſue capable of holding and exerciſing it, the Intention of the Original Grant would probably be beſt anſwered, and ſuch a Grant ſeems to be moſt conſiſtent with the Dignity of the Office.

The King muſt have been deceived in his Grant, if it has the Effect contended for, by Mr. *Burrell*'s Petition, (*videlicet*) That this High Dignity or Office has come to, and deſcended upon the eldeſt Siſter, and that Mr. *Burrell*, as her Huſband, is intitled to execute the ſame.

The Extent of this Claim is not clearly defined.

Does the Right veſt in Mr. *Burrell* and his Lady, as againſt the King?—Or could he maintain an Action againſt the King's Grantee, for the Fees or Perquiſites, if any be incident to the Office?—If he had a Child born which lived but for a Moment, would he be Tenant by the Curteſy of this Inheritance?

Had the eldeſt Siſter married one of the loweſt Order of the People, inſtead of a Gentleman of ſo reſpectable a Family as Mr. *Burrell*'s, would this Right be indefeazible, and muſt ſuch a Huſband at all Events execute this high and moſt honorable Office?

Surely this could not be the Intention of the Royal Grant, nor the legal Effect of that Perſonal Truſt and Confidence, to which this Dignity or Office owed its Creation, and muſt owe its Continuance.

This would obtrude a perfect Stranger upon the King, equally eſtranged from the Blood of the Grantee, as from the Object of the Grant.

AR. MACDONALD.
THOS. DAVENPORT.

C A S E

Upon the PETITION

OF

His Grace the Duke of *Ancaſter* and Lord *Robert Bertie*, to His Majeſty, concerning the Dignity, or Office of Lord Great Chamberlain of *England*, and referred by His Majeſty to the Houſe of Lords, upon the Report of His Majeſty's Attorney General.

To be heard at the Bar of the Houſe of Lords, on *Thurſday*, the 27th Day of *April*, 1780.

(10)